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IN THE

Supreme Court Of The United States

No. A-254

David Eugene Rogers,
Petitioner,

VS.

State of Arkansas,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

David Eugene Rogers, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on June 23, 1975.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 258 Ark. 314; 524 S. W. 2d 227 (1975), and is printed in Appendix "A" hereto, infra, page A - 1.

JURISDICTION

The judgment of the Supreme Court of Arkansas (Appendix A, infra, page A-1) was entered on June 23, 1975. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether or not the due process clause requires the trial judge, on his own motion, to give fair, lucid and correct instructions to the jury regardless of the action of counsel; whether Rule 13 of the Arkansas Supreme Court, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann., Vol. 3A, Supp. 1973, p. 126, operates to deny the petitioner due process of law and a fair and impartial trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth and Fourteenth Amendments, United States Constitution.

2. Rule 13, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann., Vol 3A, Supp. 1973, p. 126.

"Objections to Jury Instructions"

"No party may assign as error the giving or the failure to give an instruction to a jury unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection. The trial judge shall give all parties an opportunity to make objections to instructions out of the hearing of the jury.

"A mere general objection shall not be sufficient to obtain appellate review of the trial court's actions relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

"This rule shall apply to any case tried after December 31, 1971."

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Pulaski County, Arkansas, of the crime of delivering a controlled substance (marijuana) and sentenced to eight (8) years imprisonment. Petitioner appealed his conviction to the Arkansas Supreme Court, and the judgment of conviction was affirmed on June 23, 1975.

The petitioner's principal ground for appeal before the Arkansas Supreme Court was the contention that he was denied due process of law and a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of The United States by reason of the failure of the trial court to adequately and properly instruct the jury as to the essential elements of the crime charged. The Arkansas Supreme Court refused to consider this issue, stating:

> "Defense Counsel, however, made only a general objection to the instruction, which is insufficient to preserve any point for appellate review. Rule 13, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann., Vol 3A, Supp. 1973, p. 126."

The Arkansas Supreme Court rejected petitioner's contention that an accused's Constitutional guarantee to a fair and impartial trial requires the trial judge to give correct instructions, upon his own motion, regardless of the actions of counsel.

REASONS FOR GRANTING THE WRIT

This court should squarely hold that it is essential to "due process" that the jury be adequately instructed as to the law governing the offense. It should be determined that it is the function and responsibility of the trial judge to properly charge and instruct the jury in this respect, regardless of the actions, objections, or lack of objections, on the part of the counsel.

The Arkansas Supreme Court, in rejecting this petitioner's contention that the failure to give adequate jury instructions denied him due process and a fair and impartial trial, reasoned as follows:

> "Despite the absence of any objection it is argued, upon the authority of *United States v. Clark*, 475 F. 2d 240 (2d Cir. 1973), that a defendant's constitutional right to a fair and impartial trial requires the judge to give correct instructions upon his own motion, regardless of the action of counsel. . .
>
> ". . . The Court of Appeals, after reversing the judgment upon another point, held that the instructions were so deficient and defective as to amount to 'plain error. . . affecting substantial rights' within the meaning of Rule 52(b) of the Federal Rules of Criminal Practice. That rule provides that plain errors or defects affecting substantial rights may be noticed by an appellate court although they were not brought to the attention of the trial court. We have no such rule in Arkansas. On the contrary, our Uniform Rule 13, *supra*, requires that objections to instructions be specific, to the end that new trials will not be

> required for errors that might have been corrected had they been brought to the attention of the trial court."

The Arkansas Supreme Court has said that its Rule 13 prevents that court from considering even plain errors and defects which affect substantial rights of the parties unless a specific objection is made to the instruction. Serious errors in the course and conduct of a criminal proceeding, materially and substantially affecting the rights of the accused, should be subject to appellate review, irrespective of whether or not appropriate objections in proper technical form were properly asserted at the trial court level. Where an accused has been over-reached and denied a fair trial, he should not be further penalized for the inadvertence, inattention, or lack of zealousness or ingenuity on the part of his counsel in preserving every technical objection that might be asserted at the trial court level.

The Federal Court system has long followed the principle (Rule 52b) which permits appellate review of plain errors.

The Arkansas Supreme Court has made a determination that its Rule 13 renders it powerless to correct grave miscarriages of justice resulting from serious error in the charge where defense counsel has failed to properly preserve his objections.

Putting it bluntly, the issue here is whether or not an appellate review court can accord due process under a "rule" which prohibits it, in certain instances, from considering plain errors and defects in trial proceedings.

Petitioner contends that his right of due process is paramount to Rule 13 and entitles him to a decision on the merits of his case, where his substantial rights are affected and impaired.

> "This is not, after all, a case of nitpicking over nuances in a judge's charge; the errors go directly to a defendant's right to have a jury told what crimes he is actually being tried for and what the essential elements of those crimes are." *U. S. v. Fields*, 466 F. 2d 119, 121 (2d Cir. 1972)

The petitioner contended below that he was denied due process of law because the trial jury was not adequately instructed or informed as to the law governing the offense. It is fundamental to due process that the jury not be permitted to deliberate upon petitioner's guilt or innocence without being adequately instructed as to the essential elements and characteristics of the crime. Without such basic instructions, the submission of the case to the jury would be a farce. *Bollenbach v. U. S.*, 326 U. S. 607, 612, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946).

Here the only instruction the trial court gave, aside from the stock instructions as to presumption of innocence and reasonable doubt, was Instruction #6 which reads as follows:

> "The defendant is charged with the offense of delivering a controlled substance, to-wit: Marijuana. Act 590 of 1971 as amended, makes it unlawful for any person to deliver Marijuana, a controlled substance, as defined within the Act.

> " 'Deliver' is defined as follows: 'Deliver' or 'delivery' means actual, constructive or attempted transfer from one person to another of a controlled substance in exchange for money or anything of value, whether or not there is an agency relationship."

This instruction is patently vague, ambiguous, abstract, inadequate, confusing and misleading. No explanation whatsoever was given to the jury as to the meaning of the legal terms "constructive or attempted transfer" used in the second paragraph of this instruction.

The statutory definition of deliver, when read alone, is far too complex to expect any layman or jury to understand its full import. For example, the jury was told here that "deliver" means the ". . . constructive or attempted transfer from one person to another of a controlled substance." The ambiguous phrasology "from one person to another" does not limit or confine the transfer to the accused.

Perhaps even more damaging and confusing is the final phrase of Instruction No. 6 wherein the court told the jury that deliver can mean "a constructive transfer" "*whether or not there is an agency relationship.*" No attempt is made to explain or define to the jury what constitutes an "agency relationship." Numerous volumes have been written by legal scholars and jurists defining and outlining the legal concepts and implications of "agency," yet no one sentence was expended here to enlighten the jury as to the legal significance and

meaning of this terminology. Does "agency relationship" mean accomplices, accessory, co-conspirators? Does it encompass the requirement of actually aiding and abetting? Even these principles were not instructed upon.

The confusing and ambiguous portion of this instruction struck right at the core of the defense testimony. The jury was left to speculate on what constituted a "constructive" transfer, and was told in essence that it did not make any difference whether there was an "agency relationship" so long as an actual transfer took place between somebody, or between two people.

This phrasology could only serve to confuse and mislead the jury. It was abstract and not germane, yet its inclusion without further definition may well have stripped the defendant of the last vestige of his defense in this case. In *Quercia v. U.S.*, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1946), this court said: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the 'governor of the trial' for the purpose of assuring its proper conduct and of determining questions of law." This idea was reaffirmed in *M. Kraus & Bros. v. U.S.*, 327 U.S. 614, 66 S. Ct. 710, 90 L. Ed. 894 (1946).

For his appeal to the Arkansas Supreme Court, the petitioner relied heavily on the principle enunciated in *U. S. v. Clark*, supra and *Bollenbach v. U.S.*, supra, that it is essential to due process and to the discharge of the

judge's responsibility that the jury be given the required guidance of lucid, clear and complete instructions as to the essential elements of the crime, in understandable terms.

In *U.S. v. Clark*, supra, the United States Court of Appeals for the 2nd Circuit, in a very similar case, applied the reasoning and language set forth by this court in *Bollenbach v. U.S.*, supra, as follows:

> "Complex legalisms must be translated into simple prose that will be understandable by the average layman. The essential elements of the alleged crime or crimes and of any defenses raised by the defendant should be clearly described. Terms of legal significance should be defined in a way that will be understood.
>
> "The Supreme Court observed in *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946), a case considerably more complex than the case here, that 'discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.' Cf. *United States v. Persico*, 349 F. 2d 6 (2d Cir. 1965). We are compelled to conclude in the present case that the guidance given the jury did not approach that standard required to enable it to fulfill its function properly, and that consequently a new trial must be had."

We ask this court to hold that a state trial judge is required to give the jury correct and adequate

instructions as to the governing law irrespective of whether or not he is requested to do so, and that such failure is tantamount to a violation of due process.

CONCLUSION

This court should squarely hold that it is the primary duty and responsibility of the trial judge to adequately charge and instruct the jury with respect to the essential elements and characteristics of the crime charged, regardless of the action of counsel. This petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A"
SUPREME COURT OF ARKANSAS

No. CR-75-24
Opinion Delivered June 23, 1975.

David Eugene Rogers,

V. Appellant

State of Arkansas, Appellee

Appeal from Pulaski Circuit Court
Fourth Division
Richard B. Adkisson, Judge

AFFIRMED

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. The jury found the appellant Rogers guilty of having delivered a controlled substance and fixed his punishment at $4,000 fine and imprisonment for eight years. The State's proof showed that on February 5, 1974, Rogers sold a pound of marihuana to an undercover agent, Officer Walters, for $135. Roger's present attorney, who did not represent him in the trial court, argues three points for reversal.

First, the statutory definition of marihuana contains an exception excluding certain parts of the plant, such as the mature stalks. Ark. Stat. Ann. §82-2601 (n) (Supp. 1973). It is contended that Rogers was entitled to a directed verdict of not guilty, because the State failed to prove that the marihuana assertedly sold to Officer

Walters did not consist solely of the excepted parts of the plant. The statute itself—being a Uniform Act—answers that contention by expressly providing that it is not necessary for the State to negate any exemption or exception, in the information or at trial, the burden of proof being upon the person claiming the exemption or exception. Section 82-2630; *Smith v. United States*, 269 F. 2d 217 (D. C. Cir. 1959), cert. den. 361 U. S. 865 (1959); *Garner v. State*, Ark. , S. W. 2d , also decided today.

Secondly, it is insisted that the court erred in allowing the package of marihuana to be introduced in evidence, because a positive chain of possession was not established. We find no error. Officer Walters testified that after buying the marihuana on February 5 he took it to the Little Rock police headquarters and stored it in the narcotics safe. Before storing it he put his initials and the date on a piece of paper. He then put that piece of paper and the marihuana in a plastic bag, which he sealed with a heat-sealing machine. He explained that the machine "wasn't working too proper at that time and I may have added a staple to it." He also attached police department property tag No. 1101 to the bag, writing his initials on the tag. Two days later Officer Bullerwell took the package, bearing tag No. 1101, from the safe and delivered it to Don Wise, a chemist at the State Department of Health. Wise, after testing the substance and finding it to be marihuana, put the package in a vault, where it remained until he brought it to court on the day of trial. Wise identified the package as the one

he received on February 7. Walters, Bullerwell, and Wise all testified.

The appellant, in insisting that the package was not admissible, relies upon several asserted uncertainties in the State's testimony. Although Officer Walters, testifying more than six months after he sealed the bag, said that he "may have added a staple" to the heat seal, there were no staple marks on the bag. The slip of paper described by Officer Walters was not in the bag when it was offered in evidence. Upon that point the chemist, Wise, testified:

> Q. Were there any markings inside the plastic bag?
>
> A. I made note of no markings. I do not know whether there was or not. I don't recall.

Officer Walters identified his handwriting on tag No. 1101, but it was partly in ink and partly in pencil, because "the pen went bad." When the officer was asked on cross-examination if he was identifying the tag, his answer was: "Yes, sir. I couldn't swear that this is — but it was —" At that point the witness was interrupted by defense counsel and did not finish whatever he started to say.

Despite some uncertainties in the State's testimony, the trial court properly admitted the package into evidence. Officer Walters testified that he put tag No. 1101 on the package, that he initialed it, and that the initialed tag was on the package when it was offered in

evidence. The intervening chain of custody was established. Thus there was a prima facie showing of admissibility. The appellant relies upon *Fight v. State*, 254 Ark. 927, 497 S. W. 2d 262 (1973), but in that case there were somewhat similar deficiencies in the State's proof. In upholding the trial court's action in allowing the introduction of the evidence we said: "The court held the evidence admissible, but told the members of the jury that it was up to them to decide whether Officer Langston eventually placed in the mails the same substance that was given to him." In the case at bar the minor uncertainties in the proof were matters to be argued by counsel and to be considered by the jury, but they did not render the package inadmissible as a matter of law.

Finally, it is insisted that the trial judge was wrong in giving the following instruction at the State's request:

> The defendant is charged with the offense of delivering a controlled substance, to-wit: Marijuana. Act 590 of 1971, as amended, makes it unlawful for any person to deliver Marijuana, a controlled substance, as defined within the Act.
>
> "Deliver" is defined as follows: "Deliver" or "delivery" means actual, constructive or attempted transfer from one person to another of a controlled substance in exchange for money or anything of value, whether or not there is an agency relationship.

Defense counsel, however, made only a general objection to the instruction, which is insufficient to perserve any point for appellate review. Rule 13, Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann., Vol. 3A, Supp. 1973, p. 126.

Despite the absence of any objection it is argued, upon the authority of *United States v. Clark*, 475 F. 2d 240 (2d Cir. 1973), that a defendant's constitutional right to a fair and impartial trial requires the judge to give correct instructions upon his own motion, regardless of the action of counsel. The *Clark* case, however, is readily distinguishable from this one, owing to substantial differences between the federal procedure and our state procedure.

In *Clark* the trial judge extemporaneously gave oral instructions that were in some respects incomplete, incomprehensible, and wrong. The Court of Appeals, after reversing the judgment upon another point, held that the instructions were so deficient and defective as to amount to "plain error . . . affecting substantial rights" within the meaning of Rule 52(b) of the Federal Rules of Criminal Practice. That rule provides that plain errors or defects affecting substantial rights may be noticed by an appellate court although they were not brought to the attention of the trial court. We have no such rule in Arkansas. On the contrary, our Uniform Rule 13, *supra*, requires that objections to instructions be specific, to the end that new trials will not be required for errors that might have been corrected had they been brought to the attention of the trial court.

Affirmed.